Supreme Court, U.S.
FILED
MAY 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1770

In The

Supreme Court of the United States

October Term, 1982

NATIONAL ENQUIRER, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

SHIRLEY JONES, MARTY INGELS,
Real Parties In Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To The Honorable Justices Of The United States Supreme Court:

Real Parties Shirley Jones ("Jones") and Marty Ingels ("Ingels") (collectively, "Real Parties"), hereby file this brief in opposition to the Petition for Certiorari filed by the National Enquirer, Inc. ("Enquirer" or "Petitioner").

I.

INTRODUCTION

This matter centers around the National Enquirer's desire to publish private facts about Real Parties which it has discovered or may discover solely by virtue of the

discovery processes of the California trial court and which are not a matter of public record.[1]

Real Parties and the trial court shared the concern that, absent an appropriate protective order, the Enquirer, under the asserted protection of the First Amendment, would publish sensitive, irrelevant and prejudicial statements, allegations or documents in order to coerce an unfair settlement or prevent a fair trial by disseminating such harmful "facts" in advance of trial to poison the well of potential jurors without judicial scrutiny or control. This precise dispute involves no restrictions on the rights of the Enquirer's counsel to seek, obtain or utilize such information in accordance with the applicable rules of evidence and procedure and in no way represents any potential restriction on the abilities of counsel to defend their client in the proper forum of a court, rather than the questionable tribunal of public opinion. Indeed, despite Petitioner's claimed defenselessness, its continuing discovery since the entry of the subject Protective Order has been consistently wide-ranging and aggressive on all fronts.

By bringing the underlying action, Real Parties have logically waived their constitutional rights of privacy, if at all, (American Law Institute, *Restatement of the Law Second,* Torts 2d, § 652D, *comment* h) only to the extent germane to the purposes of the lawsuit and not for all purposes. Accordingly, the Enquirer is entitled to informa-

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[1]Under the pertinent provision of California's Discovery Act, Code of Civil Procedure §§ 1985 et seq., answers to interrogatories, responses to requests for admissions, documents produced in response to subpoenas or requests and deposition transcripts are not filed with the court and do not become public records unless lodged with the court in connection with a particular motion or trial.

tion it seeks for purposes of its legal defense only and is not entitled to enlist judicial aid in collecting distasteful grist for its defamatory mill.

The Enquirer cries for special protection and claims a special "urgency" in dealing with the trial court's limited Protective Order of January 5, 1983, ("Order" or "Protective Order") which is the subject of its Petition For Writ of Certiorari ("Petition"). However, not only is there no need for urgency, there is no need for review and there is no need for summary reversal. If the Enquirer's claimed First Amendment right to expose private facts discovered exclusively through court processes about the lives of celebrities is sanctioned, the propriety of the judicial process will be threatened and the rights of all private litigants, celebrity and non-celebrity alike, trampled.

As demonstrated below, Real Parties provide an accurate representation of the nature and scope of the Protective Order at issue, and the facts cry out for the minimal protection accorded plaintiff, Jones, and former plaintiff, Ingels.[2] The Order has been upheld by both the intermediate and highest appellate courts of California and contains only those provisions necessary to insure that the judicial discovery process does not become an investigative arm of the editorial staffs of publishers and make

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[2]Since the entry of the order, Ingels has dismissed his lawsuit without prejudice. However, to the extent of confidential information germane to him or his business has been or will continue to be discovered, he is still interested in this Petition. His concern is particularly justified by the Enquirer's continuing efforts in discovery, even after his dismissal, to elicit as much harmful and unfavorable information about him as possible. Since he is no longer a party to this action, it must be presumed that such efforts are for purposes other than the Enquirer's legal defense.

the order realistically enforceable. Accordingly, this court should dismiss the Petition and let the lower courts' well reasoned judgment stand.

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II.

STATEMENT OF FACTS

A. Procedural History

On or about October 9, 1979, the National Enquirer, ("Petitioner") published a false and defamatory article about Jones and Ingels containing the most pernicious gossip. A true and correct copy of this article is attached hereto as Exhibit "A" ("subject article"). The subject article accused Jones, an actress, of being a "crying drunk," "blurring her lines" on the set of her television show as a result, and forcing the cessation of filming because of her inebriation. Ingels, Jones' husband, was accused of having a "notorious casting couch" and cheating celebrities and advertisers.

As a result of the subject article, in November, 1979, Jones and Ingels initiated this lawsuit asserting claims for libel, invasion of privacy and intentional infliction of emotional distress and alleging that "[s]aid article is false, untrue, libelous and defamatory" (Tab 10, pg. 3).[3] It was on this basis that the trial court heard Jones and Ingels' Protective Order request on October 25, 1982. The trial court's spontaneous comments at that hearing (Petition, Appendix C) were ultimately refined and embodied

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[3]All references to "Tab" numbers are to those documents included in Appendix "A" to The Enquirer's Petition For Writ of Mandate filed in the California Court of Appeal.

in a written order of January 5, 1983 (Petition, Appendix D4).[4]

Petitioner's Petition For Writ of Mandate to the California Court of Appeal was denied on March 9, 1983, and its Petition For Hearing to the California Supreme Court was also denied on April 13, 1983.

B. Facts Justifying Protective Order

Contrary to the Enquirer's contention that "[t]he order here is based on no findings whatsoever and no evidence whatsoever" (Petition, p. 11), the factual record demonstrates a compelling need for the protective order issued in this matter.

The Enquirer is a publication[5] with a huge national circulation[6], dealing to a large extent with "celebrity gossip" (Tab 5, p. 5) and engaged in a "form of legalized pandering designed to appeal to the reader's morbid sense of curiosity" (Tab 5, p. 6). Petitioner categorically refuses to enter into any stipulation limiting its asserted plenary rights to publish any and all information it might

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[4]The Petition interweaves portions of the Order with the comments of the trial court at the hearing, hoping to meld the most favorable of each into an amalgam which this Court should consider and overturn. In fact, the Enquirer mischaracterizes the oral statements of the judge as the "oral opinion" of the Court, (Petition, Appendix C) although it was at all times contemplated that a written order would embody the final statement of the Court's ruling. (Petition, Appendix D).

[5]Although adjudicated in *Burnett v. The National Enquirer*, LASC No. C157213, to be a magazine for purposes of the California Retraction Statute, California Civil Code § 48a, the Petition still suggests that it is a "newspaper" (Petition, p. 8). However, since this very point is currently before the California Court of Appeal, (2d Civ. No. 66447) Real Parties will simply refer to Petitioner as "a publication".

[6]The Enquirer's circulation nationwide is approximately 4,000,000; its readership, approximately 18,000,000. California is the state of its largest circulation and readership.

uncover solely in discovery through the efforts of its attorneys (Tab 5, p. 7).

Petitioner's publishing record and discovery efforts to the date of the Order justifies the trial court's concern that abuse of the discovery process might occur, affording Petitioner improper leverage in the litigation which the judicial process is not intended to afford any litigant (Petition, Appendix C, p. 9a). Although the article clearly deals with sensitive matters, the unbridled discovery efforts of Petitioner transcend the bounds of good faith and relevance to seek improper, intimate, personal and business information about Real Parties which has no arguable connection to the underlying lawsuit, especially since the dismissal of Ingels.

Petitioner claims inaccurately that the trial court made no suggestion that any of the "discovery requests . . . were unreasonable in themselves . . . and that the court said its discovery was 'proper' " (Petition, p. 6). In fact, Paragraph 4 of the Order *denies* certain of Petitioners' then pending Motions for further discovery heard that same date (save for some information Real Parties' counsel stipulated would be provided after a narrowing of the original request). The trial court was and is obviously and properly concerned with the unwarranted overbreadth of Petitioner's discovery (Petition, Appendix C, p. 4a). Contrary to Petitioner's suggestion, the trial court never suggested that its discovery was proper or necessary. Rather, the trial court merely indicated that Petitioner might in the future end up with "sensitive information because of the proper use of the discovery process" (Petition, Appendix C, p. 9a).

Among other things, the Enquirer seeks information regarding all "clients for whom [Ingels] served as a

celebrity broker," (Tab 1, p. 6, Interrogatory No. 15) (the Petition for Certiorari itself suggests that there were at least 139 persons in this category alone, Petition, p. 16); financial information concerning Ingels' celebrity broker business, Ingels, Inc. (Tab 1, p. 6, Interrogatory 16); the identity of "each person with whom [Ingels] ha[s] had sexual relations in the past five years" (Tab 1, p. 8, Interrogatory No. 25); "each person of whom [Ingels] have or have had nude or semi-nude photographs" (Tab 1, p. 8, Interrogatory 26); the details of confidential business transactions (Tab 1, Interrogatory Nos. 13 and 20); and other such private and confidential matters. Not coincidentally, some of the subjects of Petitioner's discovery were the precise types of valueless "celebrity gossip" of an intimate nature which Real Parties fear would be published in advance of trial.

The record below thoroughly documents that preserving the confidentiality of the business information sought by Petitioner is necessary (*See generally,* Tab 5, pp. 11-12; Tab 5, pp. 14-15), since revelation of Ingel's customer lists, confidential contract terms, and business information would disadvantage him in the highly competitive market in which he operates (Tab 5, p. 11). The involvement of Real Parties' state and federally protected constitutional privacy rights as they relate to the intimate sexual matters is also clear and was in fact admitted by Petitioner in the trial court (Tab 6, p. 4, n. 2).

III.

THE TRIAL COURT'S ORDER IS NOT UNNECESSARILY RESTRICTIVE GIVEN THE BALANCE OF INTERESTS INVOLVED

Presented with the clear and present risk of abuse of discovery and harm to Real Parties which Petitioner and

its threat of publication presents, along with its refusal to stipulate to any limitation on its asserted publication prerogatives, on the one hand, and the sensitive business and intimate personal constitutionally protected information sought, on the other, the trial court thoughtfully stated its motivation for its order:

> "[The Enquirer] is a very powerful media source which published an article that is clearly damaging to the plaintiffs in this case, that they exercised their right to litigate. As a result of that, then they are compelled to provide information to your client, and your client may well end up getting sensitive information about celebrities, very newsworthy information, because of the proper use of the discovery process.
>
> "That information, however, is plainly subject to misuse and abuse that plainly is subject to the use, as a sledge hammer, to hurt those who seek to bring an action against a powerful publication or those who would seek to help people in that situation and that those people who have obligations to provide truthful information may find themselves on the front page of the Enquirer if there isn't a protective order." (Tab 7, p. 8, at 9-22)

The court in rendering its decision evidenced its sensitivity to the rights and interest of all litigants, stating:

> "In any event, I think this is the appropriate time and place for a protective order, at the beginning of court ordered discovery, that I certainly anticipate that the parties will be able to resolve a number of their disputes, and they should have as a background for that resolution the protective order. . . . That one has to balance the danger of a restraint on a publication against the danger of an abuse of the power of that publication to unfairly prejudice the rights of litigants to come to court to seek redress for an alleged wrong. (Tab 7, pp. 13-14)

A fair analysis of the protective order at issue here shows that it bears only slight resemblance to the order which Petitioner's hyperbole suggests.

First, the order places no restriction or limitation whatever on the scope of Petitioner's discovery or its ability to "defend itself". It is concerned solely with insuring the use of information gathered by access to the discovery process for proper litigation purposes and not for improper purposes such as pre-trial publication for unfair advantage (Petition, Appendix D, para. 7g and h). To that end dissemination of the information is limited to counsel and persons necessary to the litigation of the matter (Petition, Appendix D, para. 7d).

Further, Petitioner flatly misstates the record when it states that the "trial court urged" that it "constrict its discovery" (Petition, p. 8, n. 5). This is an extraordinary and false characterization of the trial court's conduct. The trial court suggested that, in light of the protective order, Petitioner might want to limit its clearly overbroad discovery so as to steer clear of irrelevant areas of fact not helpful to its defense which it might desire to publish. This was simply to avoid any requirement under the order to demonstrate that published information identical to that obtained through discovery was independently obtained. ("I think the Enquirer should have fair notice of that so that they can narrow the scope of what they are seeking through the court's process if they so choose" (Petition, Appendix C, p. 14a). "Now it may be that the Enquirer would prefer not to conduct such broad discovery so that its ability to publish stories it wants to publish is not constrained by it in this case". ". . . I want to give you an opportunity to think through your tactics" (Petition, Appendix C, pp. 15a and 16)).

Petitioner's contention that the order applies to "any information designated by Ms. Jones and Mr. Ingels as 'confidential documents or information'" (Petition, p. 6), is equally misleading. In fact, the protective order specifies the certain categories of material covered thereby, such as "sexually related material" (Petition for Certiorari, Appendix D, para. 4(a)-(c) and 7), and allows Real Parties, when discovery is sought to designate information within those categories protected by the Order. Real Parties cannot designate "any information" under the Order, but only that within the specified categories. Furthermore, the Order is equally sensitive to Petitioner's interests, since it renders Real Parties' designation of confidential information *ineffective* if Petitioner objects that the designation is not within the categories of protected material, and if *Real Parties* do not apply to the court within ten days to resolve the issue (Petition, Appendix D, para. 7a).

Not surprisingly, those portions of the Protective Order to which Petitioner directs its primary concern are those which are absolutely necessary to render the order practically enforceable; first, the extension of the protection to not only the actual material discovered but to the fruits thereof (Petition, Appendix D, para. 7h), and, second, after a showing by Real Parties that discovered information or the fruits thereof had been published, the placing of the burden of establishing that the published information was independently obtained on Petitioner (Petition, Appendix D, para. 7i).

Petitioner makes much of the fact that the protective order applies not only to protected material obtained in discovery, but also to information which may be gener-

ated or discovered through access to that material (Petition, p. 6). As Petitioner is obviously aware, without this requirement the protective order can be easily circumvented. An order precluding publication only of the very information discovered if applied, for example, to information regarding any "sex partners" Ingels may have had, could be circumvented simply by using the information provided to contact those persons and then obtain the very information discovered which could then be published.

An order that precludes merely the publication of information produced to the Petitioner, while not restricting the Petitioner from utilization of such discovered information as telephone numbers to bother, harass or otherwise intrude on the personal life of the Real Parties is a hollow protection to Jones, Ingels, Ingels' celebrity clients, or their past or present acquaintances.

That portion of the protective order placing the burden on Petitioner to demonstrate that publication did not derive from access to discovered information is another provision which if eliminated would render the order meaningless, since as the trial court aptly observed, ". . . the only way to prevent an abuse of process is to presume and put the burden on the Enquirer" (Petition, Appendix C, p. 14a).

Petitioner, however, fails to point out that before the burden is placed on it to demonstrate that the published material did not derive from access to confidential discovered material, Real Parties must make a "showing" that information subject to the order was in fact pub-

lished.[7] That showing would include, when applicable, proof that Petitioner obtained the material it published as a "fruit" of discovery. This is an extremely heavy burden for Real Parties to bear, for it requires a showing that the Petitioner's investigative process led to the information that was ultimately published.

Placing the burden on the Petitioner after Respondents make their showing of publication effects little change, if any, in the ordinary allocation of the burden of proof. When Real Parties satisfy their burden of demonstrating that personal and intimate information has been published and that this information was provided in confidential discovery material, a permissible inference arises that the publication in fact derived from access to that same confidential, discovered material.

Allocating the burden to Petitioner to demonstrate that the published information did not derive from access to confidential information is consistent with the time honored method of allocating the burden to the party having exclusive control over the evidence. If Petitioner would have difficulty in proving that it obtained the information from independent sources, how could Real Parties possibly make such a showing? If any party has the ability to prove that the published information did not derive from discovered information or access thereto, it is the Petitioner.

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[7]Petitioner flatly mischaracterizes the Order when it states that the prohibition applies even to information obtained from and verified by independent sources, if it was published as the result of access to "discovery information". (Petition, pp. 7-8). In fact, that court meticulously distinguished between independently discovered information which may also have been obtained in discovery. So long as it was truly independently obtained it can be published with impunity even though it was also obtained in discovery.

IV.

WHEN ACCURATELY ANALYZED THE ORDER PRESENTS NO CONSTITUTIONAL INFIRMITY

The entire Petition is grounded upon at least three faulty premises: first, that a protective order regulating the Court's own processes is a prior restraint or otherwise subject to constitutional limitation; second, that there is a newsman's source privilege which would be of necessity violated by Petitioners having to meet its burden of showing that independently of discovery it obtained material which was published and; finally, that if it does have First Amendment claims in this situation, they automatically warrant ignoring Real Parties' constitutionally based rights.

A. The Regulation Of Pre-Trial Procedures, Including Discovery, To Insure A Fair Trial Is Well Within The Court's Control And Not Generally Susceptible To First Amendment Challenge.

Although protective orders may restrain communication by the discovering party with third parties, they traditionally have not been thought to raise First Amendment interests in disseminating information received in discovery.

This court has made clear that special potentially harmful characteristics of a particular type of speech involved may render inapplicable the prohibition against prior restraints. *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U. S. 748, 771-772 (1973). Such a principle is aptly applied to information generated by use of court processes.

Furthermore, the very issue presented here was fairly resolved in *International Products Corporation v. Koons*, 325 F. 2d 403, 407-408 (2d Cir. 1963), where Judge Friendly distinguished between information obtained in discovery and that obtained independently. He rejected a First Amendment attack on a protective order limiting use of information obtained in such discovery, stating:

> "The portion of the order which seals the deposition of Seldes and limits defendants and others in their use of information obtained therefrom was plainly authorized by F. R. Civ. Proc. 30(b) and we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing in advance of trial, of information obtained by one party from another by use of the court's processes. Whether or not the rule itself authorizes so much of the order as also seals all affidavits submitted by defendants on various motions, we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of the court's of law our and their own process, to prevent abuses, oppressions and injustices.'" [citation omitted]

In *Parker v. Columbia Broadcasting Systems*, 320 F. 2d 937, 938-939 (2d Cir. 1963) the court upheld a protective order restricting the use of information gained in the discovery process against constitutional challenge, stating:

> "Insofar as the order enjoins appellant from 'in any way publishing, disseminating, publicizing, or otherwise promulgating to any person or entity, all or any portion of the document', we hold that, in view of the nature of the document, the order was properly issued under the inherent 'equitable powers of courts of law over their own process to prevent abuses, oppression and injustice'".

The Third Circuit in *Rogers v. United States Steel Corp.*, 536 F. 2d 1001, 1006 (3d Cir. 1976) has stated:

> "It may well be, for instance, that the parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes. *Cf. International Products Corp. v. Koons* . . . Thus, for purposes of this appeal, we assume arguendo that if the district court had prohibited disclosure only of information derived from the discovery processes, its order would have been constitutional."

California courts appear to have adopted the same position. *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313 (1982).

The Order at bar meticulously distinguishes between information obtained independently of court processes and that obtained from those judicial processes. Only the latter is subject to the order.

In support of its First Amendment claims, Petitioner heavily relies upon, among other cases, Judge Bazelon's opinion, over a sharp dissent, in *In Re Halkin*, 598 F. 2d 176, 188 (D. C. Cir. 1979). However, that case is inapposite on that point, as it concerned political matter, otherwise *public record*, which "lies near the heart of the information protected by the First Amendment", dealing with governmental surveillance of citizens opposed to the Vietnam War. The court noted:

> "An order restraining *publication of official court records open to the public*, or an order restraining political speech, implicates different interests than

an order restraining commercial information." *Supra* at 190.[8] (Emphasis added.)

Judge Wilkey's strong dissenting opinion argued:

"[W]hen a party uses the court's process in a manner which may be unfair to the other party and is unrelated to the litigation purpose of discovery, the court has the power and responsibility to take whatever action is necessary to protect its process from abuse. . . ." *Supra* at 208.

Judge Wilkey pointed out the logical contradiction of the majority's position. For "good cause", under the discovery rules, discovery can be denied altogether even if such a bar can seriously impair the party's ability to litigate effectively. The *Halkin* majority's illogical analysis requires a stricter standard to regulate the use of material of which discovery is permitted. *See,* Note, *"The First Amendment Right to Disseminate Discovery Materials: In Re Halkin"*, 92 Harv. L. Rev. 1550, 1553-54 (1979) (criticizing *In re Halkin*). Moreover, public records are not involved in California.

The key concern in these cases is precisely that shared by Real Parties and the trial court, that is, that Petitioner not be allowed to abuse the discovery processes to oppress and gain unfair advantage over Real Parties.

In Re Halkin and the first amendment principle for which it is cited has been roundly criticized by other courts. District Judge Becker, in *Zenith Radio Corp. v. Matushita*

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[8]It is precisely this type of commercial business information that is involved here, in addition to information within Real Parties' right of privacy. Unlike news agencies which cover trials or court proceedings for the public, Petitioner, all the while asserting the right to publish, makes no claim of public interest and no claim that the information it seeks to discover is inherently newsworthy.

Electric Indus. Co., 529 F. Supp. 866, 911-912 (E. D. Pa. 1981) stated:

> "The overriding purpose of a protective order is to facilitate the communication of the information between litigants. To accomplish that end, it may be necessary to limit speech by parties and their counsel outside the court. Several general governmental interests support the imposition and enforcement of such order. First, the courts must preserve the integrity of the discovery system and protect litigants from 'annoyance, embarrassment, oppression or undue burden or expense', Rule 26(c) and guard against abuse of their own processes. . . . Third, the courts have a general responsibility to do justice. Litigants in many cases cannot be guaranteed a fair trial of their claims and defenses if necessary documents and materials are not produced; at the same time, the court must seek to protect from unwarranted harm parties whose rights may ultimately be vindicated at trial [citation omitted]."

In rejecting *In Re Halkin*, Judge Becker concluded:

"In sum, we think that the proper standard for deciding not to declassify certain documents is not a 'heavy presumption' of unconstitutionality, but a balancing test." *In Re Halkin* has been further limited and questioned with respect to its First Amendment statements in the cases of *In Re Upjohn Company Antibiotic Cleocin Products*, 644 F. 2d 114 (6th Cir. 1981); and, *Brink v. Dalesio*, 82 F. R. D. 664, 677, 678 (D. Md. 1979).

Petitioner suggests that *In Re Halkin* has been approved by this court in *Gulf Oil Co. v. Bernard*, 452 U. S. 89, 102, n. 16 (1981). However, Justice Powell's citation of *In Re Halkin* in that case simply noted *Halkin's* proper

use of the standard for protective order under F. R. Civ. P. 26(c), which is not involved in this case.[9]

In Re San Juan Star Co., 662 F. 2d 108, 116 (1st Cir. 1981), also cited by Petitioner, acknowledges that "protective orders can also give judges the discretion to exercise their constitutional duty to protect litigants' right to a fair trial and privacy". The court refused to accept the position of the *In Re Halkin* majority that protective orders limiting dissemination of discovery information are prior restraints and utilized an analysis "midway between the majority and dissent in *Halkin*".

B. In Light Of The Fact That There Is No Constitutional First Amendment Deficiency In The Order, Petitioner's Spurious Newsman's Source Claims Should Be Dismissed.

As demonstrated above, there is no constitutional prohibition against protective orders regulating discovery. Accordingly, whether meeting the mandate of the protective order requires divulging of "confidential news sources" as Petitioner contends (Petition, p. 20) has little bearing.

That very contention is premised on a misconception; that there is a constitutionally created newsman's source privilege. Despite all the lower court authorities cited by Petitioner (Petition, p. 20, n. 13) this Court has found

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[9]N. 16 of *Gulf Oil Co. v. Bernard, supra,* stated "Cf. *In Re Halkin,* 194 U. S. App. D. C. 257, 274, 598 F. 2d 176, 193 (1979) ("To establish 'good cause' for a protective order under [Federal Rule of Civil Procedure] 26(c); [t]he courts have insisted on a particular and specific demonstration of fact, as distinguishes from stereotyped and conclusory statements) . . ."

no such privilege. *Branzburg v. Hayes,* 408 U. S. 665 (1972) concluded in the criminal grand jury context that no such privilege, absolute or conditional exists. In *Herbert v. Lando,* 441 U. S. 153 (1979), a civil libel litigation, this court also failed to find an absolute newsman's editorial and source privilege and suggested by its rationale that *Branzburg* would be totally applicable in the civil context, barring even a conditional privilege.

Moreover, the problems which such a privilege poses are aptly illustrated in this case. The trial court ordered disclosure of all sources, stating that further efforts at independent investigation were not necessary because of all of the inaccurate information Petitioner had provided in discovery upon which Real Parties had relied to their expense and detriment (Petition, Appendix D, p. 21a).

C. Petitioner's Position Ignores Real Parties' Constitutional Rights To Privacy And A Fair Trial.

Remarkably absent from the Petition for Certiorari is any reference whatsoever to Real Parties' constitutional rights, on the assumption that no rights other than Petitioner's warrant consideration. However, Real Parties have privacy and other first amendment rights and a right to a fair trial which must be balanced with Petitioner's. The trial court properly did so in its Order.

Real Parties' rights to privacy have been clearly and admittedly implicated by Petitioner's discovery. A fundamental right to privacy has been found embodied in the United States Constitution, in the penumbra to the Bill of Rights. *Griswold v. Connecticut,* 381 U. S. 479 (1965). *Griswold* dealt with the same subject which was an object of Petitioner's discovery, that is matters related to the intimacies of a person's sex life.

California has also enshrined such a Constitutional right in Article I, Section 1 of its Constitution which defines inalienable rights, stating:

> "All people are by nature free and independent, and have inalienable rights. Among these [is] . . . privacy."

California courts have gone to some lengths in enumerating matters within this constitutionally protected right of privacy. These include associational rights and medical histories, *Britt v. Superior Court,* 20 Cal. 3d 844 (1978); matters relating to individuals' sexual conduct, *Fults v. Superior Court,* 88 Cal. App. 3d 899 (1979) and *Morales v. Superior Court,* 99 Cal. App. 3d 283 (1979); matters relating to the personnel files or information within an employer/employee relationship, *Board of Trustees v. Superior Court,* 119 Cal. App. 3d 516 (1981), and financial information of a personal nature, *Cobb v. Superior Court,* 99 Cal. App. 3d 543 (1979), *Dompeling v. Superior Court,* 117 Cal. App. 3d 798 (1981), and *Valley Bank of Nevada v. Superior Court,* 15 Cal. 3d 652 (1975).

The foregoing enumerated zones of privacy are not exclusive, but merely illustrations of the general proposition that where there exists a "reasonable expectation of privacy", *Valley Bank of Nevada v. Superior Court, supra,* the constitutional guarantees will operate.

This rather extensive and significant line of Federal and California authorities is understandably ignored in Petitioner's one-sided critique of the protective order. Fortunately, its significance was not lost on the trial court which appropriately balanced all the parties' rights in this dispute.

Even Real Parties' First Amendment rights may be implicated at bar. As stated in *Wooley v. Maynard,* 430 U.S. 705, 714 (1979). "[B]oth the right to speak freely and the right to refrain from speaking at all" are embodied in freedom of speech. Thus "in absence of sufficient justification, a court's denial of a motion for a protective order may itself be an unconstitutional infringement of the producing party's first amendment rights". Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: the First Amendment and Good Cause,* 1980 Duke L. J. 766, 793.

In addition, Real Parties are entitled to have a trial by a jury consisting of citizens who have not been inundated by Petitioner's pre-trial publication of judicial discovered "facts", edited and embellished for maximum effect on potential jurors. Real Parties offer to prove that before trial in the *Carol Burnett* case, the Petitioner engaged in a massive nationwide image building radio and television campaign which included numerous assertions that this subject article and many others were true. For this there is no effective right of cross-examination. There is no reason why the safeguards against prejudicial pretrial publicity afforded in criminal cases cannot be similarly afforded Real Parties, who have a real and legitimate fear of Petitioner's "siedge hammer" (as the trial court put it) tactics.

When these rights of Real Parties are balanced on the scale, it is clear that the protective order here is as narrow as possible while still realistically and practically retaining the ability to protect all parties' interests.

V.

CONCLUSION

The trial court's Protective Order reflects a sensitive and delicate balancing of the significant rights of Real Parties, the interests of Petitioner and the clear and present danger for abuse presented. It seeks to insure that its processes are used for litigation, not publication. To permit its improper use outside of litigation would be to give Petitioner a bludgeon with which to pressure Real Parties with concerns unrelated to the litigation. A fair reading of the order makes clear that it is tailored as narrowly as possible, consistent with considerations of practical enforceability. Under these circumstances, there is no reason why this order should be reversed.

In the event review is contemplated, we commend the Court's attention to *Seattle Times v. Rhinehart,* No. 82-1721, which involves similar issues in the protective order —libel context.

Respectfully submitted,

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